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Supreme Court of the United States.

OCTOBER TERM—1920.

No. 167

GIUSEPPE CAVALLARO,

Petitioner,

—against—

Steamship "CARLO POMA," etc.
KINGDOM OF ITALY,

Claimant.

No. 317

GIOVANNI LUZZATO and another,

Appellants,

—against—

The Steamship "PESARO," etc.
KINGDOM OF ITALY,

Claimant.

BRIEF FOR THE PETITIONER AND APPELLANTS.

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INDEX TO CONTENTS.

	PAGE
Facts of the *"Carlo Poma"*	2-5
Facts of the *"Pesaro"*	5-6

Arrangement of this Brief.

Two distinct questions involved:

To what extent immunity should be granted to the merchant ships of foreign sovereigns. Dealt with as Part I.	6-7
The right of a foreign ambassador to claim such immunity by a direct application to our courts, and the right of private litigants to traverse the suggestion of the ambassador. Dealt with as Part II	7

PART I.

Immunity.

Point I.

The question of the immunity of a merchant ship of a foreign sovereign is of novel impression in this Court	7
The Exchange, only case involving the immunity of a ship of a foreign sovereign heretofore *decided* by this Court	7
Discussion of *The Exchange*	7-10
The Exchange is to be distinguished from the present cases	10

CASES SINCE THE EXCHANGE IN WHICH THE DOCTRINE OF SOVEREIGN IMMUNITY HAS BEEN CONSIDERED:

PAGE

That our courts may take jurisdiction of a prize taken or harbored in our territorial waters in violation of our neutrality 10-13

That property of the United States is not immune from process if actual physical possession of it is not held by an officer of United States 13

That if the United States is the moving party in a litigation, third parties may assert claims to property even in the possession of officers of the United States 13-14

That even vessels owned by the United States and in the possession of its officers become subject to maritime liens, just as privately owned vessels do; the only distinction is that there may be no court with jurisdiction to enforce the lien if the sovereign is a necessary party to the suit..... 14-15

That suit may be brought against officers of the United States to try title to land held by such officers on behalf of the United States..... 15-18

DECISIONS OF THE INFERIOR FEDERAL COURTS IN IMMUNITY CASES.

Cases holding that ships that are owned, manned and operated by private persons, although under requisition by a foreign sovereign, are *not* immune to process 18

PAGE

Cases holding that foreign navy transports commanded by commissioned naval officers and manned by enlisted navy men, and foreign vessels engaged as army transports, are immune from process.. 18

Cases now before the Court where the vessels are alleged to be owned and in the possession of a sovereign, but are concededly engaged as merchant ships in the carriage of goods for hire..... 19

Point II.

The extent of immunity..... 19

The attitude of the United States in regard to immunity of its merchant ships as indicated by Federal legislation..... 19-25

The limit to the conception of what property is endowed with sovereign attributes 25

The English cases..... 28-30

Italian Law..... 30-31

PART II.

The admissibility and conclusiveness of the suggestion of the Ambassador.

Statement 32

Decided cases as authorities..... 32-41

Argument.

Preliminary Statement..... 41-43

The doctrine of admissibility and conclusiveness of direct ambassadorial suggestions arises out of a failure to distinguish between the several functions of an ambassador..... 41

Point I.

PAGE

If the ambassador, filing the direct suggestion in the instant cases, is presenting a "political" question, the suggestion is improper and impotent 43

Suggestion of ambassador presenting "political" question should be submitted through the State Department..... 43

Statement of a local sovereign to his courts in "political" matters is the only statement which his courts will accept as conclusive *per se*..... 43-44

Acts of a foreign ambassador acting in "political" questions distinguishable from his acts when acting in "judicial" questions 44-45

If foreign ambassador wishes to bind the Court by treating the question or issue as a "political" issue, then the suggestion should come to Court through the State Department for Court's consideration 45-46

Conclusion—Point I..... 46

Point II.

If the foreign Ambassador in filing the suggestion is presenting a "judicial" question, the suggestion is inadmissible in that it does not meet the requirements of the ordinary rules of evidence 47

PAGE

The suggestion, being an unverified *ex parte* statement in writing, is inadmissible in evidence 47
The suggestion is not admissible as public record 47
The suggestion is not admissible as a certificate of a public officer 48-51

Conclusion—Point II 51

Point III.

If the suggestion of the ambassador is admitted in evidence as being in the nature of an affidavit by the ambassador, in reference to a judicial question, the suggestion is not conclusive but is traversable 51
Suggestion only *prima facie* evidence 52
Affidavit of a foreign ambassador submitted in a local court is traversable 52
The claimant should be required to support his allegations by proper evidence 53

Conclusion—Point III 54
General Conclusion 55

PART III.

The question of immunity is a question of jurisdiction **56**

Appendix.

Letter of Avv. Francesco Montefredini 57-60

List of Citations.

PAGE

Act of July 15, 1918, Sec. 9 (40 Stat. L. 900).... 20, 21
An Act to Modify, Revise and Amend the Laws Relating to the Judiciary, Sec. 298..... 56
Alice, The, 12 Fed. 923..... 48, 50
Alliance, The, 70 Fed. 273..... 56
Annie Faxon, The, 87 Fed. 961..... 56
Appam, The, 243 U. S. 124..... 13
Attualite, The, 238 Fed. 909..... 18, 34

Briggs v. *The Light Boats,* 11 Allen 157..... 14, 30
Broadmayne, The, P. 64, 114 L. T. Rep. 891, 13 Asp. Mar. Law Cas. 356..... 30

Carlo Poma, The, 259 Fed. 369.....19, 38, 40, 41
Charkieh, The, 1 Asp. Mar. Law Cas. 581..... 28, 29
Church v. Hubbart, 2 Cranch. 187..... 48, 52
Clarke v. New Jersey Steam Navigation Co., 1 Story U. S. Cir. 528..... 28
Corpus Juris 22, page 791, et seq..... 48

Davis, The, 10 Wall. 15.....13, 32, 33
Davis, The, v. Cleveland, C. C. & St. Louis Ry Co., 156 Fed. 775..... 56

Edison Electric Light Co. v. Electric Eng. Supply Co., 60 Fed. 401..... 48, 50
Exchange, The, 7 Cranch. 116..7, 19, 24, 26, 28, 32, 34, 40

Florence H., The, 248 Fed. 1012..... 35

Gagara, The, 35 Times L. R. 243, 14 Asp. M. L. C. 547..... 30
Georgia v. Stanton, 6 Wall. 50..... 16

In re Baiz, 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222.....36, 40, 45

Jones v. U. S., 137 U. S. 202..... 44

King of Spain v. Olivia, 14 Fed. Cases 7814..... 45

Lake Monroe, The, 250 U. S. 246..... 21
Long v. *The Tampico,* 16 Fed. 491..... 33, 40
Luigi, The, 230 Fed. 493.....18, 33, 34
Luther v. Borden, 7 How. 1..... 16

PAGE

Maipo, The, 252 Fed. 627.....18, 36, 40, 45
Maipo, The, 259 Fed. 367..... 26
Merchant Marine Act, approved June 5, 1920..... 21
Mighell v. Sultan, L. R. 1894, 1 Q. B. D. 149..... 44
Moore, International Law Digest, Vol IV, page 445 42
do page 584 43
do page 631 42
do page 635 42
do § 662, page 642 53
do page 643 53
do page 642 42
do pages 680-695 42, 43
Mount Royal Steamship Co., Ltd., v. The Steamship *Gul Djemal* (unreported), decided December 22, 1920, S. D., N. Y..... 39, 40

Pampa, The, 245 Fed. 137..... 18, 35
Parlement Belge, The, 42 L. T. Rep. 273, 4 Asp. M. L. C. 234, 5 Prob. Div. 197.....24, 30, 34, 40
Pesaro, The (unreported).....19, 39, 40, 41
Porto Alexandre, The, 36 Times L. R. 66..... 29

Republic of Columbia v. Cauca Co., 106 Fed. 337.. 45
Republic of Mexico v. de Arrangoiz, 12 N. Y. Sup. Ct. Rep. 634.....45, 52, 55
Resolute, The, 168 U. S. 437..... 56
Roseric, The, 254 Fed. 154..... 18, 37

Santissima Trinidad, The, 7 Wheat. 283, 335..... 10
Sapphire, The, 11 Wall. 164..... 45
Shipping Act of 1916, Sec. 9.....20, 21, 23
Shipping Act of 1916, Sec. 26.....23, 24, 25
Siren, The, 7 Wall. 152..... 13
Stanley v. Schwalby, 147 U. S. 508..... 17
Suits in Admiralty Act, approved March 9, 1920.....21, 22, 23, 25

Underhill v. Hernandez, 168 U. S. 250..... 44
U. S. v. Jahn, 155 U. S. 109..... 56
U. S. v. Lee, 106 U. S. 196..... 15
U. S. v. Lew Pow Dew, 119 Fed. 786..... 48, 50
U. S. v. Wilder, 3 Sumner U. S. First Cir. 313.. 28

Williams v. Suffolk Insurance Co., 13 Peters 415.. 44
Workman v. New York City, 179 U. S. 552..... 14

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BRIEF FOR THE PETITIONER AND APPELLANTS.

These two cases, and the case of the S. S. "Baron Ogilvy" (No. 555) were directed to be heard together because they present similar questions as to the extent of the immunity of merchant ships of foreign governments.

Facts of the "Carlo Poma."

The petitioners filed a libel *in rem* against the S. S. "Carlo Poma," alleging that

1. The vessel was a general ship engaged in the common carriage by water of merchandise for hire between various ports (p. 1).

2. A shipment of 10,712 boxes of lemons was shipped in good order on the "Carlo Poma" at Messina, for carriage to New York and that bills of lading were duly issued covering the shipment.

3. The cargo, when discharged and delivered to the petitioner at New York, was seriously damaged because of poor stowage, etc.

4. The petitioner was the owner of the shipment and his loss through the damage to the lemons during their carriage amounted to $60,000 (p. 2).

The libel is the ordinary libel *in rem* to recover for damage to cargo.

Process was issued against the vessel in usual course and the U. S. Marshal took possession of her.

Thereupon counsel appeared specially for the Royal Italian Ambassador and moved for an order staying the execution of process and in support of the motion filed the following suggestion (pp. 3-4):

"ROYAL ITALIAN EMBASSY

> Count V. Macchi Di Cellere, Ambassador of the Kingdom of Italy to the United States of America, through Burlingham, Veeder, Masten & Fearey, proctors appearing specially for the Italian Steamship "Carlo Poma," respectfully sug-

gests to the District Court of the United States for the District of New York, that said steamship "Carlo Poma" at all the times mentioned in the libel was, and now is, owned by the Government of the Kingdom of Italy, being registered in the name of the Italian State Railways, a branch of said Government, and in the possession of the Government of the Kingdom of Italy, in the person of a master employed and paid by said Government, and wholly manned and operated by a crew employed and paid by said Government, which said steamship is to transport back to Italy a cargo belonging to the Government of the Kingdom of Italy.

Wherefore, it is respectfully suggested and prayed that said steamship be released from any seizure made and declared immune from process.

Done at the Embassy of the Kingdom of Italy, Washington, D. C., September , 1918.

MACCHI DI CELLERE.

(Seal Italian Embassy)."

"Suggestion No. 753

UNITED STATES OF AMERICA

DEPARTMENT OF STATE

To all to whom these presents shall come, Greeting:

I certify that Count V. Macchi Di Cellere, whose name is subscribed to the paper hereto annexed, is duly accredited to this Government as Ambassador Extraordinary and Plenipotentiary from the Kingdom of Italy.

In testimony whereof, I, Robert Lansing, Secretary of State, have hereunto caused the Seal of the Department of State to be affixed and my

name subscribed by the Chief Clerk of the said Department, at the City of Washington, this 26th day of September, 1918.

ROBERT LANSING,
Secretary of State.

By BEN G. DAVIS,
Chief Clerk.

(Seal)

For the contents of the annexed document the Department assumes no responsibility."

A hearing was then had after which the following order was entered, which really summarizes the whole matter:

"It appearing that a libel was filed herein on September 27th, 1918, praying that process issue against the steamship "Carlo Poma," her engines, boilers, etc., and that said process having issued to the Marshal for the Southern District of New York, and Burlingham, Veeder, Masten & Fearey, appearing specially on behalf of the Royal Italian Ambassador for the steamship "Carlo Poma," having moved this Court for an order staying the execution of said process,

Now, on reading and filing the process and the suggestions of the Royal Ambassador and High Commissioner of the Kingdom of Italy, authenticated and vised by the Secretary of State of the United States whereby it appears that the said steamship "Carlo Poma" at all the times mentioned in the libel, was and now is owned by the Government of the Kingdom of Italy, registered in the name of the Italian State Railways, a branch of said Government, and in the possession of said Government, commanded and manned by a master and crew employed and paid by the said Government, and about to transport back to Italy a cargo belonging to said Government, and after hearing William P. Allen, Esq., of Burlingham,

Veeder, Masten & Fearey, proctors appearing specially as aforesaid in support of said motion and D. Roger Englar, Esq., of Harrington, Bigham & Englar, proctors for libellant in opposition thereto, and due deliberation having been had thereon, and being of the opinion that this Court should not and will not take jurisdiction herein for the reason that said steamship "Carlo Poma" is represented to be public property of the Government of the Kingdom of Italy and in public use, such suggestion being made by the Ambassador of H. M. the King of Italy to the United States and not herein denied.

Now, on motion of Burlingham, Veeder, Masten & Fearey, proctors appearing specially on behalf of the Royal Italian Ambassador for the steamship "Carlo Poma" as aforesaid, it is

Ordered, that execution of said process of attachment be, and the same hereby is stayed.

Enter,

CHAS. M. HOUGH,
U. S. C. J."

An appeal was taken and the order was affirmed. The opinion of the Circuit Court of Appeals appears at page 8 of the record and is reported in 259 Fed. Rep. 369.

A writ of certiorari was granted by this Court on October 24, 1919.

FACTS OF THE "PESARO."

A libel was filed by the appellants, substantially similar in form to the libel in the "Carlo Poma," to recover for damages to a shipment of 290 cases of olive oil shipped at Genoa to New York.

A suggestion was filed by counsel for the Italian Ambassador practically identical in wording with that filed in the case of the "Carlo Poma," except that, in the

"Pesaro" suggestion, there is no allegation that the "Pesaro" was carrying Government cargo (Record, p. 6).

On the argument before the District Court, leave was granted to the libellants to file a formal petition, setting forth certain points then argued and motions then made, and this petition was filed January 21, 1920 (p. 7). In this petition the libellants urged particularly that the suggestion should come from the Executive Department of the United States, that the statement of the Italian Ambassador as to "possession" was a conclusion of law and fact; that the libellants should be allowed to put the fact of "possession" in issue by way of a traverse, and further the libellants set forth, by way of exhibits, a certain affidavit and a copy of the bill of lading, on which the libellants based their belief that the S. S. "Pesaro" was not in the possession of the Italian Government.

The District Judge formally disposed of the arguments and motions in said petition in the settlement of the order entered January 23rd, 1920 (p. 12). This order vacated the attachment (p. 13) and in a memorandum opinion (p. 13) the Court said that the facts stated in the suggestion of the Italian Ambassador could not be controverted. A subsequent motion by counsel, appearing specially for the Italian Ambassador, to strike the petition from the record, was, on April 24th, 1916, denied by the District Court (p. 21).

From the order declaring the vessel immune, an appeal was taken to this Court on the ground that the jurisdiction of the District Court was in issue and a certificate to that effect was given by the District Judge (p. 17).

Arrangement of This Brief.

There are two distinct questions involved in these cases; *first*, the question to what extent immunity should

be granted to the merchant ships of foreign sovereigns, and, *second*, the right of a foreign ambassador to claim such immunity by a direct application to our courts, and the right of private litigants to traverse the suggestion of the ambassador. These two questions will be dealt with as Parts I and II of this Brief.

PART I.

Immunity.

POINT I.

The question of the immunity of a merchant ship of a foreign sovereign is of novel impression in this Court.

The only case involving the immunity of a ship of a foreign sovereign heretofore decided by this Court is

The Exchange, 7 Cranch. 116 (1811).

The schooner "Exchange" originally belonged to the libellants but was captured by the French, condemned by the French Prize Court and converted into a French vessel of war. Upon her entering an American harbor thereafter, the libellants filed a libel to procure a decree restoring her to them.

A suggestion was filed by the United States Attorney, at the instance of the executive department of the United States Government, setting up that the vessel was a vessel of war belonging to a friendly sovereign and praying for her release from process. A denial of the suggestion was filed by the libellants and supporting affidavits were filed by the United States Attorney.

The District Court dismissed the libel, the Circuit Court reversed the judgment and the United States Attorney appealed to this Court.

The opinion of the Court is by Marshall, C. J. He says:

> "This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States? The question has been considered with an earnest solicitude, that the decision may conform to those principles of national and municipal law by which it ought to be regulated. In exploring an unbeaten path, with few, if any, aids from precedents or written law, the Court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this.
>
> The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute; it is susceptible of no limitation, not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty, to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.
>
> This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory. The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other,

and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation, in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage. A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns, nor their sovereign rights, as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

He then says there are three cases in which every sovereign state is understood to waive a part of its complete

territorial jurisdiction, and to regard as immune while in its territory:

1. The person of a foreign sovereign.

2. The ministers of foreign sovereigns.

3. The troops of foreign sovereigns permitted to pass through its territory.

He concludes that the same reasons applied in favor of foreign vessels of war.

As to the *extent* of the immunity he says:

> " * * * all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act."

The *Exchange*, it is to be noted, is to be distinguished from the present cases in two important particulars:

> 1. The *Exchange* was a vessel of war, a unit of the navy of France.
>
> 2. Her release was demanded by the Executive Department of the United States.

Since the "Exchange," the doctrine of sovereign immunity has been considered in a number of cases that have a bearing more or less directly upon the present cases. The more important of them are as follows:

1. It has been held that our courts may take jurisdiction of a prize taken or harbored in our territorial waters in violation of our neutrality.

> *The Santissima Trinidad*, 7 Wheat 283, 335 (1822).

Holds that prizes captured by warships outfitted in violation of our neutrality may be restored to their rightful owners in a suit *in rem*. Mr. Justice Story, delivering the opinion of the court, said:

> "An objection of a more important and comprehensive nature has been urged at the bar, and that is, that public ships of war are exempted from the local jurisdiction, by the universal assent of nations; and that as all property captured by such ships, is captured for the sovereign, it is, by parity of reasoning, entitled to the like exemption; for no sovereign is answerable for his acts to the tribunals of any foreign sovereign.
>
> In the case of *The Exchange* (7 Cranch 116), the grounds of the exemption of public ships were fully discussed and expounded. It was there shown that it was not founded upon any notion that a foreign sovereign had an absolute right, in virtue of his sovereignty, to an exemption of his property from the local jurisdiction of another sovereign, when it came within his territory; for that would be to give him sovereign power beyond the limits of his own empire. But it stands upon principles of public comity and convenience, and arises from the presumed consent or license of nations, that foreign public ships coming into their ports, and demeaning themselves according to law, and in a friendly manner, shall be exempt from the local jurisdiction. But as such consent and license is implied only from the general usage of nations, it may be withdrawn, upon notice, at any time, without just offence, and if afterwards such public ships come into our ports, they are amenable to our laws, in the same manner as other vessels. To be sure, a foreign sovereign cannot be compelled to appear in our courts, or be made liable to their judgment, so long as he remains in his own dominions, for the sovereignty of each is bounded by territorial limits. If, however, he comes personally within our limits, although he generally enjoys a personal

immunity, he may become liable to judicial process, in the same way, and under the same circumstances, as the public ships of the nation. But there is nothing in the law of nations which forbids a foreign sovereign, either on account of the dignity, of his station, or the nature of his prerogative, from voluntarily becoming a party to a suit in the tribunals of another country, or from asserting there, any personal, or proprietary, or sovereign rights, which may be properly recognized and enforced by such tribunals. It is a mere matter of his own good will and pleasure; and if he happens to hold a private domain, within another territory, it may be, that he cannot obtain full redress for any injury to it, except through the instrumentality of its courts of justice. It may, therefore, be justly laid down, as a general proposition, that all persons and property within the territorial jurisdiction of a sovereign, are amenable to the jurisdiction of himself or his courts: and that the exceptions to this rule are such only as, by common usage and public policy, have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their dignity and rights. It would, indeed, be strange, if a license implied by law from the general practice of nations, for the purposes of peace, should be construed as a license to do wrong to the nation itself, and justify the breach of all those obligations which good faith and friendship, by the same implication, impose upon those who seek an asylum in our ports. We are of opinion, that the objection cannot be sustained; and that whatever may be the exemption of the public ship herself, and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts, for the purpose of examination and inquiry, and if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality; and

> if the goods are landed from the public ship, in our ports, by the express permission of our own government, that does not vary the case, since it involves no pledge, that if illegally captured, they shall be exempted from the ordinary operation of our laws."

The same result was reached in the recent case of

The Appam, 243 U. S. 124.

2. It has been held that property of the United States is not immune from process if actual physical possession of it is not held by an officer of United States.

The Davis, 10 Wall. 15 (1869).

An agent of the U. S. Treasury shipped cotton, the property of the United States, on the "Davis," a privately owned schooner. The "Davis" suffered a disaster and the libellants performed salvage services, bringing her and her cargo safely to port, and then libelled both hull and cargo, before the cotton was delivered into the actual possession of any officer of the United States. *Held* (1) a salvage lien attached to the cargo and (2) the lien might be enforced by a libel filed against the cotton provided a seizure under the libel could be made without taking the property out of the actual possession of the government, exercised by a government officer.

3. It has been held that if the United States is the moving party in a litigation, third parties may assert claims to property even in the possession of officers of the United States.

The Siren, 7 Wall. 152 (1868).

A confederate vessel was captured and while on her way to the port of adjudication in charge of a prize

master and crew, came into collision with the sloop "Harper." The owners of the sloop "Harper" intervened in the prize court proceedings and were allowed to recover their damages out of the proceeds of the "Siren" on the theory that the United States, by instituting proceedings to condemn the vessel as prize, submitted to the jurisdiction so far as to allow a presentation of set-offs. The case contains a full review of the prior cases in which private parties were allowed to enforce liens on property owned by and in the possession of the Government.

4. It has been held that even vessels owned by the United States and in the possession of its officers become subject to maritime liens, just as privately owned vessels do; the only distinction is that there may be no court with jurisdiction to enforce the lien if the sovereign is a necessary party to the suit.

> *Briggs* v. *The Light Boats,* 11 Allen 157 (Mass. 1865).

The petitioners had performed labor and furnished materials in the construction of three light ships. After the vessels were turned over to the United States Government and put in charge of the Light House Board, the petitioners sought to enforce mechanics' liens given by the statutes of Massachusetts. *Held* the vessels were not subject to the Court's jurisdiction. The opinion contains a very interesting historical review of the remedies of an individual against the sovereign.

> *Workman* v. *New York City,* 179 U. S. 552 (1900).

Held that a libel *in personam* would lie against the City of New York to recover for a maritime tort com-

mitted by a fire boat while engaged in fighting a fire. The Court said:

> "We, of course, concede that where maritime torts have been committed by the vessels of a sovereign, and complaint has been made in a court of admiralty, that Court has declined to exercise jurisdiction, but this was solely because of the immunity of sovereignty from suit in its own courts. So, also, where, in a court of admiralty of one sovereign, redress is sought for a tort committed by a vessel of war of another nation, it has been held that, as by the rule of international comity the sovereign of another country was not subject to be impleaded, no redress could be given."

5. It has been decided that suit may be brought against officers of the United States to try title to land held by such officers on behalf of the United States.

United States v. *Lee*, 106 U. S. 196 (1882).

This was a suit in ejectment by certain individuals against two officers of the United States who were in charge of Arlington, the national cemetery. Title in the United States was set up by the defendants, and a suggestion of title in the United States was also presented by the United States Attorney. The Court proceeded to try the title on the merits and awarded the property to the plaintiffs (p. 207), saying:

> "On the other hand, while acceding to the general proposition that in no court can the United States be sued directly by original process as a defendant, there is abundant evidence in the decisions of this Court that the doctrine, if not absolutely limited to cases in which the United States are made defendants by name, is not permitted to interfere with the judicial enforcement of the established rights of plaintiffs when the United States is not a defendant or a necessary party to the suit."
>
> * * *

"Another class of cases in the English courts, in which attempts have been made to subject the public ships and other property of foreign and independent nations found within English territory to their jurisdiction, is also inapplicable to this case; for, both by the English courts and ours, it has been uniformly held that these were questions the decision of which, as it might involve war or peace, must be primarily dealt with by those departments of the government which had the power to adjust them by negotiation, or to enforce the rights of the citizen by war. In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction. Such were the cases of *The Exchange* v. *McFaddon*, 7 Cranch 116; *Luther* v. *Borden*, 7 How. 1; *State of Georgia* v. *Stanton*, 6 Wall. 50." *

* * *

"This examination of the cases in this Court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the Court, has been overruled and denied in every case where it has been necessary to decide it, and that in many others where the record shows that the case as tried below actually and clearly presented that defence, it was neither urged by counsel nor considered by the Court here, though, if it had been a good defence, it would have avoided the necessity of a long inquiry into plaintiff's title and of other perplexing questions, and have quickly

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* *Luther* v. *Borden*, 7 How. 1, holds that the question which of two constitutions adopted by rival conventions in the State of Rhode Island, is valid, is a political question to be decided by the State of Rhode Island.

Georgia v. *Stanton*, 6 Wall. 50, holds that the Supreme Court will not enjoin the enforcement of the Reconstruction Acts on the theory that they are subversive of the sovereignty of a state, as this is a political question.

disposed of the case. And we see no escape from the conclusion that during all this period the Court has held the principle to be unsound, and in the class of cases like the present, represented by *Wilcox* v. *Jackson, Brown* v. *Huger,* and *Grisar* v. *McDowell,* it was not thought necessary to re-examine a proposition so often and so clearly overruled in previous well-considered decisions."

Stanley v. *Schwalby,* 147 U. S. 508 (1892).

This was an action of trespass brought by certain individuals against United States army officers in command of the army post at San Antonio, Texas, for the purpose of trying the title to the land occupied by the army post. The United States District Attorney, on instructions of the Attorney General of the United States, intervened and set up title in the United States. The State Court dismissed the United States as a party. On this point the Supreme Court said *obitor:*

"We should remark, however, that from a very early period it has been held that even where the United States is not made technically a party under the authority of an act of Congress, yet where the property of the government is concerned it is proper for the attorney for the United States to intervene by way of suggestion, and in such case if the suit be not stayed altogether, the Court will adjust its judgment according to the rights disclosed on the part of the government thus intervening. Such was the leading case of *The Exchange,* 7 Cranch, 116, 147, where the public armed vessel of a foreign sovereign having been libelled in a court of admiralty by citizens of the United States to whom she had belonged and from whom she had been forcibly taken in a foreign port, by his order, the District Atorney filed a suggestion stating the facts, and the Circuit Court having entered a decree for the libellants, disregarding the suggestion, this Court, upon an appeal taken

> by the attorney of the United States, reversed the decree and dismissed the libel, and Mr. Chief Justice Marshall, in delivering the opinion of the Court, said: 'There seems to be a necessity for admitting that the fact might be disclosed to the Court by the suggestion of the attorney for the United States.'"

The Court then considered the merits and held that a plea of adverse possession, set up by the defendant, was good and might be availed of by the United States.

Decisions of the Inferior Federal Courts in Immunity Cases.

There have been a number of decisions in the District Court and Circuit Court of Appeals, mostly growing out of the late war. They may be classified as follows:

1. Cases holding that ships that are owned, manned and operated by private persons, although under requisition by a foreign sovereign, are *not* immune to process.

> *The Attualita*, 238 Fed. 909 (C. C. 4th Ct. 1916);
> (*The Luigi*, 230 Fed. 493, D. C. Pa., 1916 contains a dictum to the contrary.)

2. Cases holding that foreign navy transports, commanded by commissioned naval officers and manned by enlisted navy men, and foreign vessels engaged as army transports, are immune from process.

> *The Pampa*, 245 Fed. 137 (D. C. N. Y. 1917);
> *The Maipo*, 252 Fed. 627 (D. C. N. Y. 1918);
> *The Roseric*, 254 Fed. 154 (D. C. N. J. 1918).

3. The cases now before the Court where the vessels are alleged to be owned and in the possession of a sovereign, but are concededly engaged as merchant ships in the carriage of goods for hire; *The Pesaro, The Carlo Poma,* now argued, in which the lower courts allowed immunity and the *Gleneadin,* previously argued but not yet decided, in which the District Court refused to release the vessel.

POINT II.

The extent of immunity.

From the foregoing review it is clear that the immunity of the property of a sovereign from the jurisdiction of courts is subject to many limitations and it is not always easy to draw the line fixing the extent of the immunity.

As Chief Justice Marshall said in the "Exchange" (7 Cr. 116, at p. 143):

> "• • • all exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act."

The test is thus the presumed intent of the two sovereigns involved, a question partly—if not wholly—political.

How shall the Court apply this test to the new conditions growing out of the war?

The governments of the world have, as a result of

war conditions, built, or requisitioned millions of tons of shipping which they are still operating as ordinary merchant ships—a condition of which one could hardly have dreamed before the war.

How shall a Court regard such ships? What are the "views under which the parties must be supposed to act?"

The question is not simple, but two possible solutions are offered:

1. The Court may ascertain the extent of immunity claimed by the United States for vessels owned by it and operated by it as merchant ships. Is it not fair to infer that the United States intends to extend to other sovereigns the immunity it claims for itself and no other?

If this be the test then the question is answered by the legislation creating the Shipping Board—the legislation whereby the United States Government for the first time undertook to operate merchant ships. Section 9 of the original Shipping Act, 1916, reads in part as follows:

> "Every vessel purchased, chartered, or leased from the Board shall, unless otherwise authorized by the Board, be operated only under registry, or enrollment and license (American). Such vessels, while employed solely as merchant vessels, shall be subject to all laws, regulations and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein."

Section 9 of the original Shipping Act, 1916, was supplanted by a new Section 9 by the Act of July 15, 1918 (40 Stat. L. 900; Public Act. No. 198, 65th Cong.).

The above quoted clause of the original Section 9 was retained verbatim in the amended Section 9 of the Act of July 15, 1918. The Shipping Act, 1916, was further amended in many respects by the Merchant Marine Act, 1920, approved June 5th, 1920 (Public Act, No. 261, 66th Cong., 2nd Sess.). The above quoted clause of Section 9 of the Shipping Act, 1916, was, however, left intact as originally worded in the original Shipping Act, 1916. It is submitted, therefore, that Congress in three successive years, to wit, 1916, 1918 and 1920, declared a policy that merchant ships of the United States should not be entitled to sovereign immunity. The confirmation of this policy in 1920 was subsequent to the decision by this court, in the "Lake Monroe" (250 U. S. 246), so Congress was fully aware of the full legal consequences of its re-declared policy.

It is true that Congress did, by the Suits in Admiralty Act, approved March 9th, 1920—approximately three months before Congress reaffirmed the policy set forth in Section 9 of the Shipping Act, 1916—declare that United States Government owned or possessed ships should not be subject to seizure under process *in rem*. (Section 1, Public Act No. 156, 66th Congress.) For the usual remedy *in rem*, Congress substituted a remedy *in personam* against the United States Government in cases where, aside from the governmental interest in the merchant vessel, a remedy *in rem* would normally lie. It is submitted that Congress did not thereby intend to derogate in any way from its policy as stated in Section 9 of the Shipping Act, declaring merchant vessels owned by the United States, subject to legal liability in the domestic courts. This contention is sustained by the fact that Congress in the Merchant Marine Act, 1920, passed subsequently to the Suits in Admiralty Act, re-enacted Section 9 of the Shipping Act, 1916, in this respect. It is submitted that the purpose of Congress,

in the Act of March 9, 1920, was merely to remove the inconvenience and impropriety of requiring the United States Government to furnish bonds in ordinary course, to accomplish the release of its ships, and that the second purpose was merely to avoid unnecessary delay to its ships when they were seized under process *in rem*. This contention is amply sustained in the hearings before Congressional Committees. It is further sustained by the fact that Congress did not provide in the Suits in Admiralty Act, a remedy *in personam* in cases where war ships were concerned. In other words, Congress in the legislation of 1920 clearly indicated that American warships were to continue immune from judicial process, but on the other hand, merchant vessels were to be subjected to judicial process, but the remedy, for practical convenience, was made *in personam* against the United States, rather than *in rem* against the ship.

This same policy in regard to merchant vessels is declared in Section 7 of the Suits in Admiralty Act, which provides that if a merchant ship owned or possessed by the United States is arrested in a foreign port, the Secretary of State, upon request of the Attorney General, is authorized to request immunity for the ship and to execute a bond or pledge the credit of the United States to the payment of any judgment that may be entered, in order to accomplish the release of the ship. It is submitted that this Section again clearly adopts the policy of liability of merchant vessels. By this Congress says simply, we will, through the Secretary of State accomplish the release of our merchant vessels arrested in foreign ports, but, at the same time, we will give bond, or pledge the United States to pay any judgment and we do not seek to oust the jurisdiction of the foreign court and are willing that the merits as to liability shall be determined by the court before which the action is instituted.

The United States, therefore, it is submitted, by voluntarily recognizing that its own merchant vessels should not be endowed with sovereign prerogatives, directly negatives any implication that it concedes an exemption to any similar ship claiming exemption by virtue of its sovereign character. It is clearly a sufficient implication to rebut and destroy the general implication on which is predicated any concession based on sovereign character. Section 9 of the Shipping Act, 1916, and the Suits in Admiralty Act, 1920, it is contended, must, as express statutory implications, dominate any general implication as to the sovereign attitude of the United States.

Furthermore, these statutory declarations by the United States are also sufficient notice, or implication, to a foreign sovereign, that the United States does not dignify such property with attributes of sovereignty, to the extent, at least, of exempting it from judicial process, without bond or pledge of payment of judgments, and consequently that the United States does not consent to accept such property of the foreign sovereign under such conditions.

As an inevitable consequence of this notice, or implication, the foreign sovereign is foreclosed from any expectation—at least any reasonable expectation—that his similar property will be received by the United States under concessions of immunity from judicial determination of liability for its acts.

Although it should be assumed, if any indication of the attitude of the United States on the question of equal treatment to its vessels appears necessary, reference is made to Section 26 of the Shipping Act of September 7, 1916, which provides:

> "the President is hereby authorized and empowered to secure by diplomatic action equal privileges

for vessels of the United States engaged in such foreign trade" (as used in Navigation laws, meaning vessels documented under the laws of the United States, and engaged in such foreign trade), and if by such diplomatic action, the President shall be unable to secure equal privileges, then the President shall advise Congress of the facts and his conclusions by a special message, if deemed important in the public interest, in order that proper action may be taken thereon."

In view of this Section 26, it is rather more difficult to conclude that the United States indulges in any implied derogation from its sovereign jurisdiction that results in putting its own property in its own ports of the United States to a disadvantage in comparison with the similar property of a foreign sovereign.

It should be borne in mind that the immunity doctrine of the *Exchange* and all extensions thereof are based on implication only, created by legal decision, without any sovereign declaration of exemption through statute or treaty. To be sure, certain immunities have been expressly created by statute and treaty, but such express immunities were not and are not the basis of the law of immunity from process invoked here. As a matter of fact, the *Parlement Belge* (*infra*) might well have gone off on the treaty provision. In the cases at bar, the Italian Ambassador suggests no treaty exemption and none exists.

In effect, certain conceptions of the dignity of sovereignty and its attributes led the courts, and rightly so, to build up a principle of immunities based on implied sovereign expectations and resultant implied sovereign concessions respectively. There is no sound reason why the local Court should not scrutinize the acts of the local sovereign at any particular time to discover whether or not the local sovereign's acts preclude the implication that he concedes certain immunities. It is contended that

the United States by subjecting the acts of its own ships under these conditions to legal determination, in the ordinary courts, both at home and abroad, clearly negatives, and incidentally precludes any implication of, intent on the part of the United States to recognize superior sovereign attributes in this class of property.

The original immunity having been erected by the courts on an implied attitude of proper respect on the part of the sovereign for the foreign sovereign, and having been properly extended to protecting the personal dignity of the foreign sovereign and his vicarious personal dignity through his direct representative, and also to the public safety of the foreign sovereign in his armies and his battleships, or his ships engaged in military enterprises, it is contended, that beyond this point, in view of Section 9, and Section 28, of the Shipping Act, and the Suits in Admiralty Act, implications of immunity cannot be reasonably fashioned.

There is obviously a limit somewhere to a conception of what is endowed with sovereign attributes. The world has long accepted the sovereign himself, his ministers, and instruments pertaining to the safety of the sovereign, as inherently endowed with sovereign attributes. In these days when various sovereigns are taking unto themselves additional activities under their respective conceptions of what are proper sovereign functions, it seems obvious that these various sovereigns will not be in accord as to what functions are sovereign in nature and what are private. Unless, therefore, the most extreme conception of sovereign function is to dominate the judicial process and administration of law of the United States, it is essential that a limit be drawn sooner or later.

The only limit that reasonably suggests itself is the

current attitude of the United States as to what is, or what is not, endowed with sovereign attributes. This is obviously so as a practical matter, and, as has been above set forth, failure to adopt such a limit is a direct negation of the absolute territorial jurisdiction of the United States within its own territory. It is well to remember throughout a discussion of this kind that not only is a foreign sovereign's dignity involved, but that the dignity of the United States should receive some consideration.

We respectfully submit, therefore, that it is not so much, as the learned Court intimated in the "Maipo" (Hough, J., Feb. 21, 1919, Southern District of New York, 259 Fed. 367) that the Court would be dictating to the foreign Government what the foreign Government should consider to be a Governmental function, but rather the Court would only be construing on principle a municipal law, in refusing to build up further immunity-creating implications of exemption, which violate by their unreasonableness, or inconsistency, political, economic and legal principles. A brief contemplation of the future of the aeroplane and Governmental activity in aerial enterprises shows the possible difficulties of any other rule.

If it be seriously contended that the controlling element is not the attitude of the *receiving* sovereign, but the attitude of the *foreign* sovereign as to which of his property carries sovereign attributes, so as to be entitled to immunity abroad, sufficient answer is found in the fundamental principal that the sovereign's territorial jurisdiction is total in him and exclusive and any derogation, therefore, must be by his consent, express or implied. If it is the *foreign* sovereign's attitude as to person or thing that touches his sovereignty, which determines immunities in foreign states, the local Government might be subject to "degradation," and the "laws to continual infraction"—*The Exchange* (7 Cranch, at page 143). Would it be seriously contended that if any

foreign sovereign should choose to endow all his subjects with attributes of sovereignty, and so publicly declare, any such subject could enter our ports irrespective of immigration law, and remain indefinitely and do as his fancy dictated free from restriction of local law applicable to the local sovereign's own citizens?

Furthermore, any argument that the S. S. "Pesaro" should be immune can gather no strength from any doctrine of "reciprocal immunities" (which, although it fundamentally rests on the "sovereign dignity" principle of Chief Justice Marshall, may have by common usage and acceptation acquired unto itself the status of a legal principle). The S. S. "Pesaro," if a United States Shipping Board vessel, owned and registered by the United States would under the same circumstances of operation and service be subject to process in the Italian courts, so far as the United States is concerned. The United States enjoys no immunity in Italian ports and is, therefore, free to deny immunity in its own ports. Furthermore, any doctrine of "reciprocal immunities" is itself one of implication and is subject to all the above considerations.

Finally, the execution of process in the present instance does not hail the foreign sovereign, or his personal officers before our courts. This property is not in his possession, or direct control. A private steamship company has the ship—under what sort of a charter, or operating agreement, we know not. The bill of lading nowhere mentions, or refers to the Italian Government, and the bill of lading is captioned "Lloyd Sabaudo," a joint stock company limited by shares, with its principal office in Genoa, and its United States agent, Messrs. Furness, Withy & Company, Ltd.

2. There is also a second alternative; the Court may regard the extent of immunity as a political question

and look to the Executive Department of our Government for an authoritative statement as to whether the particular vessel involved is or is not viewed by the Political Branch of the Government as entitled to immunity. This possibility is more fully dealt with in the second part of this brief.

The English Cases.

The first British decision was *The Charkieh,* L. R. 4. A & E. 59, 1 Asp. Mar. Law Cas. 581 (1873). The steamship "Charkieh" was in collision with the steamship "Batavier," and the owners of the "Batavier" filed a libel *in rem* against the "Charkieh." It appeared that the "Charkieh" was the property of "His Highness, the Khedive, as sovereign Prince of Egypt." An application was first made on behalf of the Khedive of Egypt to the Court of Kings Bench for a writ of prohibition forbidding the Admiralty to entertain the libel. This prayer was denied by the full bench (L. R. 4 A. & E. 59, 1 Asp. Mar Law Cas. 533). The case then proceeded to a hearing before Sir Robert Phillimore. He reviewed the case of *The Exchange* and also the decisions of Mr. Justice Story in *United States* v. *Wilder,* 3 Sumner, U. S. First Cir., 313, and *Clarke* v. *New Jersey Steam Navigation Co.,* 1 Story, U. S. Cir. 528, as well as a number of other British and American cases, and held that the Court had jurisdiction over the "Charkieh" because she was operating as a merchant ship and not as a warship, saying, page 597:

> "This ship cannot claim exemption as a ship of war. She carries indeed the flag of the Porte, but she is not equipped in any sense for war, nor does she pretend to be so. Apart from the question of liability *jure gentium,* to which I have

adverted, I am not prepared to deny that the private vessel, for instance, the yacht, of the Sultan, though equipped for pleasure and not for war, would be entitled by international comity, operating (at least so long as it is not withdrawn by the State conceding it) as international law, to the same immunity as a ship of war; though dicta to the contrary may be found in some of the writings of some jurists. But it seems to me idle to contend, in the face of the evidence before me, that these six or seven ships are not trading vessels, to all intents and purposes, though they carry mail bags. But again I am not obliged to predicate this character of all these vessels; the one before me is actually chartered to a British subject, and has been by him publicly advertised like any other merchant vessel to carry cargo, for which he is to receive the freight. That this cargo is liable to a lien for salvage has not been denied; but suppose under the 24 Vict. c. 10 the owners of the cargo were to bring a suit *in rem* against the ship for damage to the cargo, must that suit be dismissed, and justice so far denied, because the ship was only chartered, and was not, according to the technical term of English law, demised to the British subject, and therefore remains the property of the Khedive? Such has been necessarily the contention of the counsel for the Khedive. I cannot assent to it; the mere statement appears to me to carry with it a refutation of the argument."

The later English cases, it is true, have overruled the "Charkieh," and it is important merely as the opinion of a distinguished Admiralty Judge and an interpretation by him of the state of the American law. The rule is now believed to be settled in England that a vessel owned by a foreign sovereign is immune from process, whether in the possession of officers of the foreign sovereign or not.

The Porto Alexandre, 36 Times L. R. 66, (Court of Appeal), 1919;

The Parlement Belge, 42 L. T. Rep. 273, 4 Asp. M. L. C. 234, 5 Prob. Div. 197;
The Broadmayne, 1916, P. 64, 114 L. T. Rep. 891, 13 Asp. Mar. Law. Cas. 356;
The Gagara, 1919, 35 Times L. R., p. 243, 14 Asp. M. L. C. 547 (Court of Appeal, Feb. 14, 1919).

It is to be noted that the English law has thus gone considerably beyond the decisions in this country, in that it grants immunity to the property of a foreign sovereign, even if not in his actual possession. This distinction is pointed out in the opinion of the Circuit Court of Appeals in the present case of the "Carlo Poma," p. 10. Thus, even if the present decision should be affirmed, the law of England and the United States would not thereby be rendered uniform. Nor is this a question in which uniformity between American and British law is necessarily to be expected. The British conception of a personal sovereign who has power through his ministerial officers to waive immunity, is fundamentally different from the conception of the sovereignty of the people as it exists in this country, and these two different concepts may well be expected to lead to different results in treating with the immunity of the property of domestic and of foreign sovereigns.

Briggs v. *The Light Boats,* 11 Allen 157.

Italian Law.

As both the vessels involved in these cases are Italian, it is interesting to note that by the law of Italy these vessels would not be immune from the process of the Italian Courts, nor would vessels owned by the United States and similarly operated be immune in

Italy. The Italian rule appears to be that only warships or ships used by the Government for warlike purposes are immune from process.

The Italian law is stated as above by Francesco Montefredini, a leading member of the bar of Italy, with offices at Rome and Naples, whose opinion we sought on the subject. The full text of his opinion is attached as an appendix to this brief (brief, pp. 57-60).

Therefore, if the "Carlo Poma" and the "Pesaro" are held to be immune from process in the American Courts, we have this anomalous situation. A vessel like the "Pesaro," owned by the sovereign and in its possession, but operated as a general merchant ship, would be denied immunity in the Italian Courts, whether owned or in the possession of the Italian Government or of the Government of the United States, and would be denied immunity by the American Courts if owned and possessed by the United States, as provided in the Merchant Shipping Act, but would be accorded immunity by the American Courts if owned and possessed by the Italian Government. It is believed that so anomalous a result should be avoided if possible.

PART II.

The admissibility and conclusiveness of the suggestion of the Ambassador.

Statement.

The District Court in the "Pesaro" held that the suggestion of the Italian Ambassador was (1) admissible in evidence and (2) uncontrovertible as to the facts and conclusions alleged therein—that no issue could be raised thereon. It is submitted that the mere statement of fact of an Ambassador over his signature and the seal of the Embassy, filed directly in a Court—the Department of State of the United States certifying only the official status of the Ambassador—is (1) inadmissible in evidence, and (2) if admissible, is not conclusive as to the facts and conclusions alleged therein.

Decided Cases as Authorities.

1. These precise questions, it is believed, are of novel impression in this Court. In the two cases decided by this Court, *The Exchange* (infra) and *The Davis* (infra) in which the immunity of Government property was involved, the suggestions of Governmental ownership and possession were submitted to the Court by the Attorney General of the United States.

In *The Exchange,* 7 Cranch 116, decided February 24, 1812, it appears from the statement of the case that

> "On the 20th of September, Mr. Dallas, the Attorney of the United States for the District of Pennsylvania, appeared, and (at the instance

of the Executive Department of the Government of the United States, as it was understood) filed a suggestion to the effect * * *"

In *The Davis,* 10 Wall. 15, decided in December, 1869, the United States in its own answer by the Attorney General, claimed exemption for property belonging to the United States.

2. The doctrine that a direct suggestion by a foreign Ambassador to a local court is admissible has emerged from a series of cases in the District Court and Circuit Courts of Appeals, which will be referred to in their chronological order.

In *Long* v. *The Tampico,* 16 Fed. 491, decided May 22, 1883 (District Court, S. D. New York), the Court, by way of dictum, uses the following language at the bottom of page 496:

> "Although objection to the jurisdiction alone might doubtless have been raised upon the information of the attorney general of the United States, or the direct intervention of the accredited political representative of the Mexican Government, I see no reason to disregard the mode of intervention adopted in this case, viz., by some other agent of the Government, provided he was duly authorized thereto."

The Court proceeded to find that the Agent in the particular instance was not duly authorized.

In *The Luigi,* 230 Fed. 493, decided February 22, 1916 (District Court, E. D. Pa.), the suggestion was filed by the United States Attorney at the instance of the Attorney General, and affidavits of the Italian Consul were submitted only in support. A direct suggestion by an Ambassador was not involved, but it is interesting to note that when an attorney, as *amicus curiae,*

individually suggested the public character of *The Luigi*, the Court, Thompson, J., was of the opinion that

> "Inasmuch as the suggestion raised a question of international comity, it should come through official channels of the United States Government."

This opinion is consonant with the practice followed in both *The Exchange* and *The Parlement Belge* (L. R. 5 P. D. 197), in which the suggestions of Governmental ownership came from the Executive Department of the local Government.

In *The Attualita*, 238 Fed. 909, decided October 6th, 1916 (Circuit Court of Appeals, Fourth Circuit), it appears on page 910 that:

> "'On the 20th of September the United States attorney for the Eastern District of Virginia, acting under the direction of the Attorney General of the United States, brought to the attention of the Court "that the Attorney General of the United States has received from the Secretary of State of the United States a communication, dated September 15th, 1916, to the effect that the Secretary of State has been advised by the Italian Ambassador that the Italian steamship Attualita, which has been libeled and attached in this proceeding, was at the time of the said attachment and is now requisitioned by the Italian government, and was at the time of said attachment and is now in the service of the Italian government." The district attorney stated he was further directed to call the attention of the Court in this connection to *The Luigi* (D. C.), 230 Fed. 493, and concluded by stating that "in bringing this matter to the attention of the Court the United States does not intervene as an interested party, nor do I appear either for the United States or for the Italian government, but I present the suggestion as *amicus curiae*, as a matter of comity

between the United States government and the Italian government, for such consideration as the Court may deem proper".'"

It is rather suggestive that evidence was taken in this case in respect of the relation of the Italian Government to this ship.

In *The Pampa*, 245 Fed. 137 (District Court, Eastern District of New York, August 29, 1917) the case was presented to the Court on a stipulation of fact which admitted that "The Pampa" was an Argentine naval vessel, manned by a navy crew.

In *The Florence H.*, 248 Fed. 1012 (Dist. Ct., S. D. N. Y., April 22, 1918), the Court, Learned Hand, D. J., in refusing to accept a suggestion as to the interests of the French Government, used the following language, beginning on page 1017:

> "That there may be embarrassment diplomatically, as Mr. Symmers also suggests, is of course possible; but such considerations are not justiciable by courts. A suggestion from the Secretary of State would be one thing, since he is charged with the responsibility for our relations with other powers. But a court, which is not authorized to treat in any fashion with foreign powers, should be in consequence quite inaccessible to any suggestion which is based upon international considerations. I am aware that it has in some cases been said that, before assuming jurisdiction of causes involving aliens, the court may use its discretion. Whatevermay be the grounds which may in any case control that discretion, it appears to me plain that they should not include the possible diplomatic adjustments which a decree might make necessary. If the cause is to be stayed for such reasons, the most obvious proprieties demand that the suggestion shall arise from the only source to which the court has any right to look."

In *The Maipo*, 252 Fed. 627 (District Court, S. D. N. Y., July 8, 1918), the Court accepted the suggestion filed directly in the Court by the Chilean charge d'affaires (exercising Ambassadorial functions), his official status only verified by the State Department, and on page 628 says:

> "While, in many instances, the suggestion that a ship is the property and in the possession of a foreign government would be made to the Court by the appropriate official or department of our own government, I fail to find any support for the proposition that such course is necessary. *In re Baiz*, 135 U. S. 403, 10 Sup. Ct. 854, 34 L. Ed. 222. It is enough that the fact is presented to the Court, as here, by the duly accredited official of the foreign government."

Note—In *In re Baiz*, one Baiz sought a writ of prohibition to restrain the District Court from the exercise of its ordinary jurisdiction, on the ground that he was a diplomatic representative and immune from suit in the District Court. This Court says, on page 431:

> "The alleged want of jurisdiction (in the District Court) depends upon questions of fact. It was purely discretionary whether this evidence should be admitted at the time it was presented; and in a proceeding involving the inquiry under consideration, it was plainly our duty to permit it to come in, the petitioner being afforded, as he was, the opportunity for explanation and the introduction of such other evidence as he chose to produce."

This Court intimated that the certificate of the State Department would be conclusive as to the official status of the petitioner, but held that the Court did not wish "to dispose of this case upon the mere absence of technical evidence."

In *The Roscric*, 254 Fed. 154 (Dist. Ct., Dist. N. J., Nov. 22, 1918), the British Embassy, by Counsel, who appeared specially for this purpose, filed a suggestion. It appears further that this suggestion was supported by a deposition of the ship's master, which, although not offered in evidence, was produced for the information of the Court. In discussing the admissibility of the suggestion, the Court, Bellstab, D. J., on page 163, says:

> "As to the source from which the suggestion came: What is to prevent one sovereignty from appearing in the courts of another sovereignty? Or, stated more to the point, why should the court of one sovereignty refrain from receiving a suggestion as to its lack of jurisdiction, because it comes solely from the representative of a foreign sovereignty? It is not merely a proper, but a commendable, practice for such suggestions to come through the Attorney General or one of his representatives; but is it to be disregarded unless it does so come? No case has been cited that holds as matter of law that such a suggestion will not be received from a foreign sovereign's official representative. True, in *The Luigi, supra*, upon an oral suggestion made in open court—seemingly as amicus curiæ for a foreign government—Judge Thompson said he 'was of the opinion that, inasmuch as the suggestion raised a question of international comity, it should come through official channels of the United States Government.'
>
> "In *The Florence H., supra*, Judge Learned Hand declined to receive the suggestion made on behalf of a foreign sovereign that to assume further jurisdiction might result in diplomatic embarrassment, unless such suggestion came through the diplomatic channels of this government. But I do not understand that either Judge Thompson or Judge Hand denied the power of the court to receive the suggestion through any other channels.
>
> "There may be good reasons in a given case why a suggestion from a foreign sovereignty

should not be entertained, save through the executive branch of the government, of which the court is a part. To my mind, the sources from which such suggestion will be received is a matter of judicial discretion. Each case must be governed by its own circumstances, and *The Luigi* and *The Florence H.* I take to be instances where, in the exercise of judicial discretion, it was thought best not to receive the suggestions made on behalf of foreign governments, unless they came through the executive department of our government, and not as determinations that no such suggestions would be received from any other source.

"In the instant case there are no considerations influencing the judicial discretion to refuse to act upon the suggestion made directly to the court by the British Embassy. On the contrary, from what has already been said concerning our national interests as a cobelligerent with the British government in the war pending at the time of the *Roseric's* seizure, they lead so obviously to an opposite determination that, in the absence of an intimation from the executive branch of this government that the public interests would be disserved by receiving such suggestion, its rejection would not be justified."

In *The Carlo Poma*, 259 Fed. 369 (Circuit Court of Appeals, Second Circuit, May 14, 1919) the Circuit Court of Appeals, referring to the suggestion filed by the Italian Ambassador, says on page 370:

> "That the suggestion was sufficient proof of the statements contained in it, is not seriously contested. We accept it as verity."

It may be added, parenthetically, that the sufficiency of the suggestion was objected to at all stages of the suit, but the record is possibly not clear on that point.

In *The Pesaro* (not reported) the Court held that the suggestion of the Italian Ambassador was admissible and could not be traversed, using the following language (Record, fol. 27):

> "MEMORANDUM OPINION OF COURT ENDORSED ON ORDER MADE HEREIN ON JANUARY 23, 1920. I consider that the relief prayed for in the petition of the libellant should be denied upon the ground that I hold the allegations therein or facts which may be offered in support thereof, are not admissible to controvert or question the veracity of the suggestion of the Italian Ambassador."

But the Court, in denying the motion to strike the petition from the record, uses the following language (Record, fol. 45):

> "My action in releasing the 'Pesaro' from arrest is now under review, and I am unable to see why the reviewing authority should not be apprised of all the facts that appeared before me, and which were considered in reaching my conclusion. Only by so doing, it seems to me, can the nature and extent of error, if any, be properly seen and corrected. The motion to strike out the petition is denied."

In *Mount Royal Steamship Company, Ltd.* v. *The Steamship Gul Djemal* (decided December 22, 1920, S. D. N. Y.—unreported) the Court, Knox, J., declined to adopt a suggestion filed by the Spanish Ambassador on behalf of the Turkish Government, the alleged owner of the S. S. "Gul Djemal." The Court held that, inasmuch as the Turkish Government had severed relations with the United States and relations had not been resumed, he must respectfully refer the Spanish Ambassador to the Department of State. In support of a motion for a rehearing, the proctors, appearing specially for the

Turkish Government, offered a letter, dated December 24, 1920, from the Acting Secretary of State of the United States to the Spanish Ambassador, which was written in reply to a letter from the Spanish Ambassador to the State Department, in which the Spanish Ambassador made representations to the State Department as to the ownership of the "Gul Djemal" and the fact that the "Gul Djemal" was under arrest in the District Court in New York. In its reply the State Department says: "Inasmuch as you have for a considerable period been Ambassador recognized by the Department as representing Turkish interests in the United States the Department will of course be glad to give consideration to any representations which you desire to make to this Government on behalf of the Ottoman Government in relation to the detention of the steamship 'Gul Djemal.'"

3. It will be noted from the above citations that in the early cases, including the leading cases of "The Exchange" and "The Parlement Belge," the facts on which immunity was granted were suggested to the Court by the executive branch of the local sovereign, and not by the representative of the sovereign seeking immunity. The first suggested departure from this practice—by way of the admission of a direct suggestion by the foreign ambassador—appears in *Long* v. *Tampico* (supra), in 1883 by way of dictum. *The Maipo* (1918), is apparently the first precise holding that a direct suggestion is admissible, which contains a citation in support of this doctrine—*In re Baiz,* 135 U. S. 403.

The doctrine of admissibility of direct ambassadorial suggestions was affirmed in *The Carlo Poma,* decided without citation of authority, and in *The Pesaro,* which is predicated on *The Carlo Poma.*

4. The doctrine, that a direct suggestion by a foreign ambassador to a local court is conclusive and final as to the facts and conclusions alleged therein, appears, it is submitted, for the first time in *The Carlo Poma* (supra), by implication, and in *The Pesaro* (supra), by express holding.

5. It is respectfully submitted, therefore, that both the admissibility and conclusiveness of a suggestion filed directly by the diplomatic agent of a foreign sovereign in a local court are questions of novel impression in this Court.

It is further respectfully submitted that the express decisions in the District Court and of the Circuit Courts of Appeals on these questions are the product of considerations raised by the recent war, and that this Court should scrutinize carefully the underlying principles of a practice which is fraught with far-reaching consequences.

ARGUMENT.

Preliminary Statement.

It is submitted that the doctrine of admissibility and conclusiveness of direct ambassadorial suggestions arises out of a failure to distinguish between the several functions of an ambassador.

An ambassador is the personal representative of his sovereign. He stands in the place of his sovereign. He is entitled to sovereign immunities and the prerogatives that his sovereign would enjoy were he personally present. Among such prerogatives are immunity from crimi-

nal process (Moore, International Law Digest, Vol. IV, page 631), immunity from civil process (Moore, International Law Digest, Vol. IV, page 635), and he may with propriety ignore a subpoena to appear as a witness (Moore, International Law Digest, Vol. IV, page 642).

He is entrusted with "political" questions arising between his sovereign and the sovereign to whom he is accredited. In political matters it is a well established principle of international law that his relations with the sovereign to whom he is accredited are to be carried on only with that sovereign in the latter's executive person—generally through the sovereign's foreign office—which has its analogy in the United States in the State Department—a department of the executive branch charged with international political questions (Moore, International Law Digest, Vol. IV, page 680). The impropriety of the presentation of "political" questions by a foreign ambassador to any branch of this government other than the State Department will be discussed hereinafter.

In another function, an ambassador represents his sovereign in matters other than "political." For instance, he appears, as will be more fully discussed later, as representative of his sovereign in litigation involving "judicial" questions in which his sovereign is involved. The exercise of such functions in "judicial" questions is apart from his functions in "political" questions, and the executive department of the government to which he is accredited is not directly concerned therein. In this function the foreign ambassador appears as agent of his sovereign just as an agent of a private party appears, and, it is submitted, under like privileges and limitations.

In another function, an ambassador may, under certain conditions, exercise consular functions (Moore, International Law Digest, Vol. IV, page 445).

In another function, an ambassador may use his good offices on behalf of a third sovereign who has severed relations with the sovereign to whom he is accredited (Moore, International Law Digest, Vol. IV, page 584).

POINT I.

If the ambassador, filing the direct suggestion in the instant cases, is presenting a "political" question, the suggestion is improper and impotent.

1. It is submitted that any suggestion of an ambassador which presents a "political" question should be submitted through the State Department. Although there are apparently no instances of objection by the State Department to a direct suggestion by a foreign ambassador to a judicial branch of this government (probably because the executive considered such suggestion as ordinary judicial pleadings or evidence) the cases where the executive department has complained of direct suggestions by ambassadors to Congress, the press, etc., are very numerous (Moore, International Law Digest, Vol. IV, pages 680-695). This principle was laid down by Mr. Jefferson, Secretary of State, as early as the year 1793 (Moore, International Law Digest, Vol. IV, page 680).

2. It is submitted that the statement of a local sovereign to his courts in "political" matters is the only statement, which his courts will accept as conclusive *per se*. A statement in "political" matters by a local sovereign (or an executive of a Republic) is accepted by the local courts as conclusive. These statements are statements of fact in regard to "political" questions,

which generally involve recognition of certain facts, which are dependent primarily on an attitude of the executive. Obviously, therefore, the statement of the executive must be final.

Underhill v. *Hernandez*, 168 U. S. 250;
Jones v. *U. S.*, 137 U. S. 202;
Mighell v. *Sultan*, Court of Appeal, L. R. 1894, 1 Q. B. D. 149;
Williams v. *Suffolk Insurance Co.*, 13 Peters, 415.

In *Williams* v. *Suffolk Insurance Co.*, the rights between two private litigants hinged on whether or not the Republic of Buenos Aires rightfully exercised control over the Falkland Islands. This question was in issue and the Court accepted as conclusive the statement of the Department of State, that the United States did not recognize the jurisdiction of the Republic of Buenos Aires over the Falkland Islands.

In *Mighell* v. *Sultan*, the Queens Bench Division accepted the statement by letter of the Secretary of State of Johore, to the effect that one Baker was in fact the Sultan of Johore. It will be noticed, however, that Johore was a dependency of Great Britain, so this case does not depart from the well established and unvaried rule, that it is the suggestion of the local executive branch of the Government to the local judicial branch of the Government which controls in regard to political questions.

3. It is submitted that the acts of a foreign ambassador, when he acts in "political" questions, are distinguishable from his acts, when he acts in "judicial" questions.

A foreign sovereign can sue in the courts in the United States in civil matters.

The Sapphire, 11 Wall. 164;
Republic of Columbia v. *Cauca Co.*, 106 Fed. 337;
King of Spain v. *Olivia*, 14 Fed. Cases 7814;
Republic of Mexico v. *de Arrangoiz*, 12 N. Y. Superior Court Reports 634.

In such cases the Ambassador appears as representative of his sovereign. He makes affidavits, verifies pleadings, etc., and the courts very properly will take judicial notice of his authority to act in such capacity.

It is submitted that the learned Court in the "Maipo" (supra) quoted *In re Baiz* only as authority, that an ambassador could execute and present pleadings and affidavits in support of pleadings. Reference will be made under Points II and III of this brief that such pleadings should, however, conform to ordinary rules of evidence, and that such pleadings and affidavits are not conclusive and final as to the facts alleged therein.

It is further submitted, parenthetically, that *In re Baiz* is in direct support of contention that suggestions of immunity based on "political" consideration should find their source as to facts in the State Department, and that the facts set forth in a direct suggestion of immunity can be controverted.

4. It is submitted, therefore, that if the foreign ambassador wishes to bind the Court by treating the question in issue as a "political" issue, then the suggestion should come to the Court through the State Department for the Court's consideration. If the State Department considers the question as to ownership and posses-

sion of a merchant ship to be a "political" question, then the suggestion of the State Department would probably be accepted by the Court as binding. The Court might even, without any impropriety, seek further information as to the facts from the State Department. In any event, a private party litigant would have an opportunity to present his case before the State Department and have it reflected in any suggestion made by the State Department to the Court.

Conclusion.

It is, therefore, respectfully submitted that (1) a suggestion as to a "political" question should come to the local courts from the local sovereign, that is, in the United States, from the State Department; (2) if a foreign ambassador seeks to oust the jurisdiction of a local court by treating the question before that court as a "political" question, the suggestion in regard to that "political" question and the allegations of facts thereof should come to the local court from the local sovereign, that is, in the United States, from the State Department; (3) a direct suggestion by a foreign ambassador to a local court, without reference of the "political" question to the executive department of the local sovereign, can not, after presentation to the local court in the guise of a "non-political" submittal, suddenly acquire the force of a "political" suggestion by virtue of a confused *ex post facto* reference to the binding effect of a local executive's suggestion in political matters; (4) as a suggestion filed by the foreign ambassador in regard to a "political" question, the suggestion in the instant cases is improper and impotent.

POINT II.

If the foreign ambassador in filing the suggestion is presenting a "judicial" question, the suggestion is inadmissible in that it does not meet the requirements of the ordinary rules of evidence.

1. It is submitted that the foreign ambassador, if he appears before a local court as the representative of his sovereign in litigation in which his sovereign is involved, is, as to the evidence he submits, controlled by the same rules of evidence as is any other litigant. In other words, the evidence offered by the foreign ambassador, including written statements made by him, must conform to rules of evidence prevailing in ordinary litigation.

The ambassador's suggestion in the instant cases is in the nature of an affidavit in support of certain pleadings, to wit, a motion made by counsel, appearing specifically for the sovereign, seeking the release of the ship.

2. The suggestion being merely an unverified *ex parte* statement in writing, it is submitted, without citation of authority, it is inadmissible in evidence.

> (Note.) If the suggestion should be given by this Court the force and status of an affidavit, reference is made to "Point III" (infra) for a discussion of the consequences.

3. The *ex parte* statement of an ambassador, such as the suggestion in the instant cases is, is not under ordinary rules of evidence admissible as a public record, nor as an authenticated copy of a public record. The suggestion does not purport to be a presentation of a

public record under the verification of a public officer charged with keeping a public record intended as a memorial of the act recorded. On the contrary, the suggestion is merely a recital of facts and conclusions of law signed by an individual.

22 Corpus Juris, page 791, et seq.

4. The suggestion is not admissible as a certificate of a public officer.

Church v. *Hubbart*, 2 Cranch 187;
The Alice, 12 Fed. 923;
Edison Electric Light Co. v. *Electric Engineering Supply Co.*, 60 Fed. 401;
U. S. v. *Low Pow Dew*, 119 Fed. 786;
22 Corpus Juris, Sec. 922, page 809 (generally).

In *Church* v. *Hubbart* the proof of a foreign law was involved, which, it is submitted, is analogous to the proof of ownership of property by a foreign sovereign. This Court, Marshal, Ch. J., said, beginning on page 235:

> "Foreign laws are well understood to be facts which must, like other facts, be proved to exist, before they can be received in a court of justice. The principle that the best testimony shall be required which the nature of the thing admits of; or, in other words, that no testimony shall be received, which presupposes better testimony attainable by the party who offers it, applies to foreign laws, as it does to all other facts. The sanction of an oath is required for their establishment, unless they can be verified by some other such high authority that the law respects it not less than the oath of an individual.
>
> In this case, the edicts produced are not verified by an oath. The consul has not sworn; he

has only certified that they are truly copied from the originals. To give to this certificate the force of testimony, it will be necessary to show that this is one of those consular functions to which, to use its own language, the laws of this country attach full faith and credit. Consuls, it is said, are officers known to the law of nations, and are intrusted with high powers. This is very true, but they do not appear to be intrusted with the power of authenticating the laws of foreign nations. They are not the keepers of those laws: they can grant no official copies of them. There appears no reason for assigning to their certificate respecting a foreign law any higher or different degree of credit, than would be assigned to their certificates of any other fact.

It is very truly stated, that to require, respecting laws or other transactions in foreign countries, that species of testimony which their institutions and usages do not admit of, would be unjust and unreasonable. The Court will never require such testimony. In this, as in all other cases, no testimony will be required, which is shown to be unattainable. But no civilized nation will be presumed to refuse those acts for authenticating instruments which are usual, and which are deemed necessary for the purposes of justice. It cannot be presumed, that an application to authenticate an edict by the seal of the nation, would be rejected, unless the fact should appear to the court. Nor can it be presumed, that any difficulty exists in obtaining a copy. Indeed, in this very case, the very testimony offered would contradict such a presumption. The paper offered to the Court is certified to be a copy, compared with the original. It is impossible to suppose that this copy might not have been authenticated by the oath of the consul, as well as by his certificate. It is asked, in what manner this oath should itself have been authenticated, and it is supposed, that the consular seal must ultimately have been resorted to for this purpose. But no such neces-

> sity exists. Commissions are always granted for taking testimony abroad, and the commissioners have authority to administer oaths, and to certify the depositions by them taken. The edicts of Portugal, then, not having been proved, ought not to have been laid before the jury."

In *The Alice* (District Court, S. D. Florida), in holding that a consular certificate that a copy of a bill of lading was a true copy of the original, did not make the copy admissible in evidence, the Court, at the bottom of page 924, uses the following language:

> "There is another point which would rule out the copy as authenticated were the one considered insufficient. It has been conclusively decided in the Courts of the United States that a consular certificate cannot be accepted as evidence, except where it has been made such by a statute."

In *Edison Electric Light* v. *Electric Engineering Supply Co.*, Circuit Court, N. D. N. Y., the Court at page 403 says:

> "The defendant also introduced a certificate from the Russian Department of Trade and Manufacture; that the patent expired or became 'exhausted' in December, 1891. This certificate is criticized by the complainant as not being sufficiently authenticated. I am inclined to think that the absence of a seal and the signature of a superior officer of the Russian Government renders the certificate inadmissible."

In *U. S.* v. *Law Pow Dew*, the District Court, N. D. N. Y., on page 789, uses this language:

> "While this is not the case of a judgment, it illustrates one principle contended for, that the certificate of an officer is worthless as evidence unless the making of it was an official duty, and even then it is not evidence except so far as made such by some statute. No more loose, dan-

gerous, and unsatisfactory mode of proving the judgment of a court could be devised than to permit the introduction in evidence, against objection, of the mere unsworn statement of a commissioner that he has made certain adjudication, when there is no statute making it his duty to make such a certificate. It is not the best evidence, nor is it sworn evidence, nor is it made evidence by any statute. 'A consular certificate is not evidence of any act, except as provided by statute.' *The Alice* (D. C.), 12 Fed. 923; *Levy* v. *Burley*, 2 Sumn. 355, Fed. Cas. No. 8,300; *Church* v. *Hubbart*, 2 Cranch 187, 2 L. Ed. 249; *U. S.* v. *Mitchell*, 2 Wash. C. C. 478, Fed Cas. No. 15, 791. There is far less reason for admitting in evidence the mere certificate of a United States commissioner as to the terms and effect of some adjudication made by him."

Conclusion.

It is respectfully submitted, therefore, that the suggestion in the instant cases is not admissible *per se*, under general rules of evidence.

POINT III.

If the suggestion of the ambassador is admitted in evidence as being in the nature of an affidavit by the ambassador, in reference to a "judicial" question, the suggestion is not conclusive but is traversable.

It is still urged that the suggestion is inadmissible in evidence. If, however, the suggestion is, by virtue of the signature of the ambassador and the seal of the

embassy, although unverified, accepted as an affidavit in support of pleading, it is submitted that the suggestion is only *prima facie* evidence and is traversable.

1. It is submitted that, at best, the suggestion is only *prima facie* evidence.

In *Church* v. *Hubbart,* 2 Cranch 187, this Court, Marshall, Ch. J., at the bottom of page 238, said:

> "If it be true, that the decrees of the colonies are transmitted to the seat of government, and registered in the department of state, a certificate of that fact, under the great seal, with a copy of the decree, authenticated in the same manner, would be sufficient *prima facie* evidence of the verity of what was so certified."

2. It is submitted that the affidavit of a foreign ambassador submitted in a local court is traversable.

Rep. of Mexico v. *de Arrangoiz,* 12 N. Y. Superior Court Reports, 637.

In the *Republic of Mexico* v. *de Arrangoiz,* decided in January, 1856, the Republic of Mexico sued to recover certain funds which the plaintiff contended belonged to it. The order of arrest, which issued, was founded upon the affidavit of one Juan N. Almonte, Minister Plenipotentiary of the Republic of Mexico to the United States. A motion to vacate the order was founded on the alleged insufficiency of the affidavit and also a counter affidavit purporting to show that the defendant acted as a special agent and not as a salaried officer, as had been set forth in the affidavit of the Minister Plenipotentiary. There seems to have been no question as to the right of the defendant to raise an issue of fact.

It is respectfully submitted that it would have out-

raged all sense of justice, if the affidavit of the Mexican Minister Plenipotentiary had been conclusive and uncontrovertable as to the facts alleged therein.

3. It is submitted that, in the instant cases, the ambassador apparently has preferred to waive the "political" aspect of the question affecting his sovereign. He does not approach the State Department with his question. He makes a statement to the local Court as a non-political submittal. In this connection it is significant that the State Department of the United States has not hesitated in a "non-political" question to suggest directly to a foreign sovereign that that foreign sovereign request his ambassador to the United States to appear and testify.

In Moore, International Law Digest, Vol. IV, page 643, a case is cited where the United States requested the Dutch Government to instruct its Minister to appear and testify as to a homicide, which the Dutch Minister had witnessed. The Dutch Minister was authorized by his Government to make his declaration under oath at the Department of State, but the Dutch Minister added "it is understood that no mention is to be made of a cross-examination, to which I could not subject myself." It is of further interest, in connection with the instant cases, that the "declaration was not taken, as the district attorney stated that it would not be admitted as evidence." Other cases of this nature involving requests that diplomatic representatives should testify may be found in Moore, International Law Digest, Vol. IV, p. 642, Section 662.

It is submitted, therefore, there would be no impropriety in the instant cases, in a decision by the Court that, in view of the traverse of the suggestion, the ambassador should submit further evidence, by personal testimony or otherwise. The raising of an issue of fact on

evidence submitted in a "judicial" question, involves no greater disrespect to the foreign sovereign in the person of his ambassador than does the refusal of the State Department to accept as verity the representations of the foreign ambassador in "political" questions.

Conclusion.

It is, therefore, submitted that, when a foreign sovereign comes into our Courts directly to claim property, there is raised a "judicial" question and the facts must be tried on the merits according to the rules of evidence. Obviously, unless a question is decided on the merits of the facts, it is paradoxical to refer to it as a "judicial" question.

It is submitted that the question whether or not a foreign sovereign owns or possesses certain property might be either a "judicial" or "political" question. Parenthetically, if it is a "political" question, the suggestion of that fact should come through the executive branch of the local sovereign, whose judicial branch is to be affected thereby. If, as the ambassador in the instant cases apparently considered it, the ownership and possession of a merchant ship is a judicial question, any direct suggestion by the foreign ambassador can not deprive the question of its judicial nature or the Court of its judicial function.

The United States of America, when it comes into the courts of the United States as a party plaintiff or as a party defendant, submits itself to the ordinary process of a judicial trial and asks no exceptional extra-legal privileges.

A brief consideration of the consequences of any other conclusion, in connection with the situation presented by the affidavit of the Mexican Minister Plenipotentiary in the case of the *Republic of Mexico* v. *de Arrangoiz* will, it is submitted, be convincing.

General Conclusion.

It is respectfully submitted, therefore, that (1), if submitted as a "political" submittal, the suggestion in the instant cases is improper and impotent (2), if submitted as a "judicial" submittal, the suggestion is inadmissible under general rules of evidence, and (3), if admitted in evidence as having the status of an affidavit, the suggestion is only *prima facie* evidence and is traversable.

PART III.

The question of immunity is a question of jurisdiction.

The appeal to this Court in the "Pesaro," No. 317, October Term, 1920, is properly taken under Section 238 of the Act entitled, "An Act to Modify, Revise and Amend the Laws Relating to the Judiciary," in that the question of immunity is a question of jurisdiction within the meaning of said Act.

The Alliance, 70 Fed. 273;
The Annie Faxon, 87 Fed. 961;
The Davis v. *Cleveland, C. C. & St. Louis Ry. Co.*, 156 Fed. 775;
U. S. v. *Jahn*, 155 U. S. 109;
The Resolute, 168 U. S. 437.

January, 1921.

Respectfully submitted,

HARRINGTON, BINGHAM & ENGLAR,
Proctors for Petitioner and Appellants,
64 Wall Street,
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D. ROGER ENGLAR,
OSCAR R. HOUSTON,
HAROLD V. AMBERG,
Of Counsel.

APPENDIX.

AVV. FRANCESCO MONTEFREDINI.

Naples, June 21st, 1920.

Comm. J. P. Spanier,
Naples.

I have your letter of even date enclosing copy of letter dated June 1st from Mr. Amberg and interrogatories drawn up by this gentleman.

1. QUESTION. Is a ship owned by the United States and operated for the United States as a merchant vessel by a private steamship company immune from arrest in the Italian Courts on a claim for damage to cargo or any other claim to which a private ship is ordinarily subject to arrest in the Italian Courts?

ANSWER. No. Such steamers, notwithstanding they may be owned by the U. S. Government are considered in Italy just the same as a privately owned merchant vessel, and are therefore subject to arrest, but always on the authority of the President of the Tribunal.

2. QUESTION. If such a ship is not immune from arrest because of its ownership or because it is operated as a merchant vessel by a private steamship company, is it necessary to bond the ship out pending the determination of the claim in order to accomplish the ship's release?

ANSWER. The U. S. S. B. steamers are subject to arrest, as above, only because they are *merchant* vessels, as according to the Italian law there is no difference

between a vessel owned by a foreign Government or by a private company, provided it is engaged in commercial operations. Only men of war are immune from arrest for claims.

To accomplish the ship's release the Captain or the agent usually request the President of the Tribunal to be allowed to give a bond (deposit of money or bank guarantee) in proportion to the claim, and in nearly every instance, this request is granted.

In the very recent case of the S. S. "Coahoma County" belonging to the Shipping Board, arrested in Genoa, I have succeeded in inducing the Ministry of Transports to authorize the Harbor Master at Genoa to release the vessel on receiving a letter of guarantee from the American Consul there, and this without taking into consideration the legal proceedings which will be carried on independently, but the decision is to be recognized by the Shipping Board.

A similar proceeding was followed by the American Government in the case of the Italian steamer "Argentina" (Cosulich Line), arrested in New York.

3. QUESTION. If such a ship is immune from arrest in the Italian Courts, is it because of the ownership of the vessel and in spite of the fact that it is operated as a merchant vessel by a private steamship company for the account of the United States?

ANSWER. The foregoing answers cover this point.

4. QUESTION. Is the ship owned by the Italian Government operated as a merchant vessel by the Italian Government free from arrest in ordinary, judicial process in the Italian Courts?

ANSWER. During the war all Italian steamers were requisitioned, but notwithstanding were subject to arrest. This was simply a legal point, and the steamer was

immediately released as the Government guaranteed any possible sentence, withholding from the charter money until settlement of case a sufficient amount to cover any claim.

Now this procedure will be discontinued and all merchant vessels, whether Government-owned or privately owned, will be subject to arrest.

5. QUESTION. Is a ship owned by the Italian Government but operated by a private Italian steamship company as a merchant vessel for the account of the Italian Government immune from arrest in the Italian Courts?

ANSWER. See Answer No. 4.

6. QUESTION. If a ship as set forth in No. 4 or No. 5 above is not free from arrest in the Italian Courts, what is the nature of the guarantee that must be given in order to release the ship from arrest pending the determination of the claim?

ANSWER. To secure the release in Italian ports of an Italian steamer it is usual to submit a request to the President of the Tribunal, who will decide what sum is sufficient to cover the claim, and this sum must be either deposited or a bank's guarantee given for the same amount.

7. QUESTION. If any ship owned by foreign Government is immune from arrest in the Italian Courts, how are the facts establishing the ownership of the foreign Government presented to the Court? For instance, assuming that the Italian law exempts from arrest a particular United States ship, would the filing of a statement to this effect by the United States Ambassador be sufficient or would the Italian Courts require proof of the facts set forth in such statement of the United

States Ambassador, either before the Court or some other Government official?

ANSWER. As above stated, no *merchant* ship owned by a foreign Government is immune from arrest. In every case where it may be necessary to establish the ownership either the Ship's Register or a declaration from a consul is considered sufficient.

Should either you or Mr. Amberg desire any further information I will be pleased to furnish same at your request.

Yours sincerely,

F. MONTEFREDINI.

FILE COPY

162

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

GIUSEPPE CAVALLARO

(Libellant-Appellant) Petitioner

against

Steamship CARLO POMA

(Respondent-Appellee) Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

CHARLES C. BURLINGHAM
VAN VECHTEN VEEDER
Counsel appearing specially on behalf
of the Royal Italian Ambassador
for the S. S. Carlo Poma.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

GIUSEPPE CAVALLARO,
(Libellant-Appellant)
Petitioner,

AGAINST

Steamship CARLO POMA,
(Respondent-Appellee)
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The petitioner's assignments of error present no issue of general interest or of merit.

I

THE SUGGESTION WAS PROPERLY PRESENTED AND IS CONCLUSIVE.

The petitioner's criticism of the suggestion is merely an afterthought, inasmuch as the original order recites that the petitioner appeared by counsel and did not deny the suggestion made by the Italian Ambassador that the vessel was the public property of the government of the

Kingdom of Italy and in public use (Transcript, fols. 34, 35). Since the libellant did not traverse the suggestion, it is conclusive on all material statements of fact. *The Roseric*, 254 Fed. 154. It is, therefore, a matter of merely academic interest that there is abundant authority to the effect that such suggestion is conclusive in any event. *The Parlement Belge*, L. R. 5 P. D. 197; *The Exchange*, 7 Cranch 116; *The Maipo*, 252 Fed. 627; *The Roseric*, 254 Fed. 154; *The Eolo* (1918) Ir. 78, *semble*. At least where the foreign sovereign owns the *res*. The *Attualita*, 238 Fed. 909.

Indeed, the petitioner has at no time challenged the facts suggested. He contends, however, that the suggestion was not properly presented. Coming from an ambassador, there could be no higher source of information. Our State Department acquiesced in the presentation of the suggestion, as appears by the certificate of the Secretary of State (Transcript, fols. 21-3). But it is contended that the suggestion should have been made by the Government of the United States or one of its departments. On principle, this contention is manifestly unsound. Inasmuch as the doctrine of immunity is based upon the independence and dignity of the foreign sovereign, it cannot be that he must resort to the public authorities of another government for the assertion of his right. Such dependence would be incompatible with the recognition of independence.

The procedure disclosed by the reported cases has not been uniform. While sometimes presented by officials of the sovereign of the place (as in the case of *The Exchange*, 7 Cr. 116), the suggestion has often been made directly by the accredited representative of the foreign sovereign (as in *The Maipo*, 252 Fed. 627; *The Constitution*, L. R. 4

P. D. 39, and *The Crimdon*, 35 Times L. R. 81), or by counsel on his behalf as *amici curiæ* (as in *The Roseric*, 254 Fed. 154, and *The Adriatic*, 253 Fed. 489). In *The Tampico*, 16 Fed. 491, Judge Addison Brown approved of the intervention of any agent who could produce proper proof of his authority. In *The Roseric*, 254 Fed. 154, Judge Rellstab found no case holding as a matter of law that such a suggestion will not be received from a foreign sovereign's representative. As Judge Mayer said in *The Maipo*, 252 Fed. 627: "It is enough that the fact is presented to the Court, as here, by the duly accredited official of the foreign government."

II

The vessel was clearly immune from process

It is an established principle of Anglo-American jurisprudence that no sovereign will exercise through its courts any of its territorial jurisdiction over the public property of another sovereign. *The Exchange*, 7 Cr. 116; *Briggs* v. *The Light Boats*, 11 Allen (Mass.) 157; *Mason* v. *Inter-Colonial Railway*, 197 Mass. 349; *The Parlement Belge*, L. R. 5 P. D. 197; *Vanasseur* v. *Kaupp*, L. R. 9 Ch. D. 351. The only difference between English and American law is that in our law possession in essential, and process may attach if the property can be seized without ousting the actual possession of the sovereign's officers or agents. *The Davis*, 10 Wall. 15.

In *The Exchange* (*supra*), where the principle of immunity was said by Chief Justice Marshall to be a necessary consequence of the absolute independence of the sovereign authority, a war vessel was involved; but as Mr. Justice

Gray pointed out in *Briggs* v. *The Light Boats* (*supra*), the exemption of public ships of war of a foreign sovereign depends upon their public, rather than upon their military, character: "The immunity from such interference arises, not because they are instruments of war, but because they are instruments of sovereignty." Having regard to this fact, the petitioner's contention that the vessel's immunity was lost or waived because she carried commercial cargo is clearly unsound. There is abundant authority on this point. In *The Scotia* (1903), A. C. 501, the ferryboat involved formed the connecting link in a Canadian governmental railway system, operated, of course, for commercial purposes. In *The Jassy* (1906), P. D. 270, the vessel carried materials, passengers and cargo in connection with the national railways of Roumania. In *The Parlement Belge*, L. R., 5 P. D. 197, the vessel carried passengers and freight as well as mail. In *The Constitution*, L. R. 4 P. D. 39, an American man-of-war carried cargo consisting principally of private property which had been exhibited by its owners at the Paris Exhibition. In *Mighell* v. *Sultan of Johore* (1894), 1 Q. B. 149, the defendant, while residing incognito in England, had contracted to marry.

Two of our own authorities are exactly in point. In *The Pampa*, 245 Fed. 137, a naval transport of the Argentine Republic carried general cargo as an incident of her voyage to the United States to obtain coal and munition for the use of the Argentine Republic. In *The Maipo*, 252 Fed. 627, a Chilian naval transport carried commercial cargo as an incident of a voyage to this country to secure a cargo belonging to the Chilian Government. Judge Mayer held that there was no distinction in principle, whether the wrong complained of arose, as in that case, out of breach of contract, or as in *The Pampa*

(*supra*) out of a tortious injury. *The Maipo* came before the District Court for the Southern District of New York a second time, and in an opinion filed February 21, 1919 (not reported), Judge Hough fully concurred in Judge Mayer's conclusion. "If", he said, "the Republic of Chili considers it a governmental function to go into the carrying trade, as would appear to be the case here, that is the business of the Republic of Chili; and if we do not approve of it, if we do not like it, if we do not wish any longer to accord that respect to the property so engaged which has hitherto been accorded to government property, then we must do so through diplomatic channels, and not through the judiciary".

We are not concerned with the dictum in the opinion of the Circuit Court of Appeals concerning the construction of Section 9 of the United States Shipping Act of September 7, 1916 (39 Stat. 730), because the obvious answer to the petitioner's contention that the statute referred to limits the immunity to be extended to public property of a foreign government, is that the general rule of international comity, uniformly declared and applied, cannot in the nature of things be impaired in its application to a foreign sovereign by a statutory declaration of public policy relating to a special and limited class of vessels in which the United States has an interest.

It is respectfully submitted that the petition for writ of *certiorari* should be denied.

September 18, 1919.

CHARLES C. BURLINGHAM,
VANVECHTEN VEEDER,
Appearing specially on behalf of the Royal Italian Ambassador for the S. S. *Carlo Poma*.